



2. At the hearing, Staff witness David Borden admitted that continuously since July 8, 1998 through today, KMS Macon has always been wholly owned by KMS Energy, Inc.

3. At the hearing, David Borden admitted that, as of July 8, 1998, KMS Energy, Inc. was 100% owned by three individuals, Hal Keller, Joseph Seruto and Henry Martin.

4. At the hearing it was stipulated that, as of the time of entry of ICC Order dated December 8, 1999 in docket number 98-0670 granting QSWEF status to KMS Morris Power, Inc. (an affiliate of KMS Macon), KMS Energy, Inc. was owned by KMS Energy International Inc.

5. Approximately 32 percent of the outstanding stock of KMS Energy International, Inc. is owned by each of three individual shareholders. The remaining outstanding stock is divided among several individual shareholders, each of whom owns less than three percent of the outstanding shares. ICC Exhibit, Direct Testimony of Henry Martin given in Proceeding No. 98-0670, at p. 2.

6. By its Order dated December 8, 1999, the ICC concluded and found as follows:

The Commission concludes from an analysis of the record that neither KMS [Morris], KMS Energy, nor KMS International own more than fifty percent of a source of energy generation that is not a qualified solid waste energy facility, or own more than fifty percent of an entity that is primarily engaged in the business of producing or selling natural gas or thermal energy. By applying definitions of ownership and primary business that have previously been adopted by the Commission, the petitioning facility is not considered by the Commission to be owned by an entity that is 'primarily engaged in the business of producing or selling electricity . . . from a source other than one or more qualified solid waste energy facility.' The Commission, therefore, considers that the requirements of Section 8-403.1(e) have been met.

Respondent Exhibit 5 (ICC Order, Dec. 8, 1999, 1999 Ill. PUC LEXIS 891 at \*8-9).

7. Staff witness David Borden admitted during his testimony at the hearing that the ICC has known that KMS Energy, Inc. was owned by KMS Energy International, Inc. since December 8, 1999.

8. David Borden also admitted that the purpose of the reporting requirement at issue in this hearing was to insure that Section 8-403.1(e) was not violated.

9. Finally, David Borden admitted that the ICC approved of the ownership, ownership structure, and operational structure of KMS Energy International, Inc.'s ownership of KMS Energy, Inc.

10. The Staff Report dated July 30, 2003, which was the basis for the show cause investigative order in this case is not evidence. ALJ email dated Feb. 3, 2004. Accordingly, the following portions of David Borden's testimony based upon the Staff Report constitute inadmissible hearsay and not evidence: lines 45 – 54; lines 62 – 84.

11. Also, David Borden's testimony relating to his opinions as to whether KMS Macon can comply with QSWEF ownership requirements (lines 118 – 144) is utterly irrelevant to the issue in this proceeding and, on that basis, should be stricken.

### **C. Argument**

There is not, and has never been, a change in ownership of KMS Macon. Since the date of its Qualifying Order, it has always been 100% owned by KMS Energy, Inc. To the extent Staff believes that one must go higher up the chain with respect to ownership changes, this is a red herring. The ICC has known for over three years that KMS Energy, Inc. is owned by KMS Energy International, Inc. So too has KMS Energy International, Inc.'s ownership of KMS Energy, Inc. been blessed by the ICC. It found in a December 8, 1999 Order that "the petitioning facility [KMS Morris Power, Inc., wholly owned by KMS Energy, Inc., wholly owned by KMS

Energy International, Inc.] is not considered by the Commission to be owned by an entity that is 'primarily engaged in the business of producing or selling electricity . . . from a source other than one or more qualified solid waste energy facility.' The Commission, therefore, considers that the requirements of Section 8-403.1(e) have been met." Respondent Exhibit 5 (ICC Order, Dec. 8, 1999, 1999 Ill. PUC LEXIS 891 at \*8-9). Therefore, Staff's concerns about QSWEF ownership changes, as explained by David Borden (e.g., extraction of funds from reimbursement funds, abandonment of investment vehicles, and use of gas other than landfill methane), are not implicated in this matter. By its Order dated December 8, 1999, the ICC deemed KMS Energy International, Inc.'s ownership of KMS Energy, Inc. to be acceptable and in compliance with the requirements of Section 8-403.1(e).

**D. Relief Requested**

Respondent, LePetomane VI, Inc., not individually but solely as Receiver for KMS Macon Power, Inc. respectfully requests that (1) the ICC find that Staff has failed to meet its burden of establishing that KMS Macon Power, Inc. failed to comply with the filing requirement in Finding 6 of the Order entered on July 8, 1998 in Docket 98-0163 and (2) the ICC grant such other and further relief in its favor as deemed appropriate.

**Respectfully Submitted,**

**LE PETOMANE VI, INC., not  
individually, but solely as the duly  
appointed Receiver**

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**STATE OF ILLINOIS  
ILLINOIS COMMERCE COMMISSION**

Illinois Commerce Commission	:	
On Its Own Motion	:	
-vs-	:	
KMS Macon Power, Inc.	:	
	:	03-0606
Investigation of compliance with Order	:	
granting QSWEF status.	:	

**NOTICE OF FILING**

To: See Attached  
Certificate of Service List

Please take notice that on February 18, 2004, we forwarded for filing with the Illinois Commerce Commission, 527 East Capital Avenue, Springfield, Illinois 62701, the attached **Respondent's Post Hearing Brief** in the above captioned matter.

**Respectfully Submitted,**

**LE PETOMANE VI, INC., not  
individually, but solely as the duly  
appointed Receiver**

By: Theodore F. Kommers  
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## CERTIFICATE OF SERVICE

I, Theodore F. Kommers, an attorney, state that I caused to be served a copy of the foregoing **Respondent's Post Hearing Brief**, upon the parties listed below, on February 18, 2004 before the hour of 5:00 p.m., and by depositing same in the U.S. Mail at 222 N. LaSalle Street, Chicago, Illinois.

  
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